(4)

Supreme Court, U.S.
FILED
JUL 9 1996
CLERK

No. 95-1796

In the

Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et al.,

Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITIONERS' REPLY BRIEF

LYNN E. BASICH
Counsel of Record
3000 North Hamline Ave.
Roseville, MN 55113
(612) 633-3232

Robert C. Bell
PETERSON, BELL, CONVERSE
& JENSEN, P.A.
3000 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
(612) 342-2323

Craig W. Gagnon
Peter R. Bisio
OPPENHEIMER WOLFF & DONNELLY
3400 Plaza VII Building
45 South Seventh Street
Minneapolis, MN 55402
(612) 344-9300
Attorneys for Petitioners

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

11pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. **THE FUNDAMENTAL FACT UNDERLYING THIS ENTIRE LITIGATION IS THAT THE PENSION ASSETS BELONG TO THE INDIVIDUAL PARTICIPANTS IN THE PLAN, INCLUDING PETITIONERS, *NOT* TO THE DENOMINATION ELCA.** 2

II. **THE DENOMINATION ELCA OWES DIRECT FIDUCIARY DUTIES TO ALL PARTICIPANTS IN THE PLAN, INCLUDING PETITIONERS.** 2

III. **FOR PURPOSES OF THE COURT OF APPEALS' DECISION AND THIS COURT'S REVIEW, IT *MUST* BE TAKEN AS TRUE THAT THE PLAN SUFFERED $227 MILLION IN LOSSES.** 3

IV. **THIS LAWSUIT IS NOT ABOUT RELIGIOUS DOCTRINE.** 4

CONCLUSION 7

TABLE OF AUTHORITIES

Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931) 1

Atkins v. Walker, 200 S.E.2d 641 (N.C. 1973) 5

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681-82 (1930) 1

Church of God in Christ, Inc. v. Stone, 452 F. Supp. 612 (D. Kan. 1976) 5

Clough v. Wilson, 368 A.2d 231 (Conn. 1976) 5

Fellowship Tabernacle, Inc. v. Baker, 869 P.2d 578 (Idaho App. 1994) 5

General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1355, 1372-73 (1978) 5

Olson v. Luther Memorial Church, 1996 WL 70102 (Minn. App. February 13, 1996), review denied, March 19, 1996, petition for cert. filed, (June 17, 1996) (No. 95-____). 6

Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982) 5

Simonson Cashway Co., Inc. v. Merickel Const. Co., Inc., 391 N.W.2d 903 (Minn. App. 1986) 3

Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. App. 1996), review denied, March 19, 1996, petition for cert. filed, (June 17, 1996) (No. 95-____) 6

Synanon Foundation, Inc. v. California, 444 U.S. 1307-1308 (1979) 6

Welter v. Seton Hall University, 608 A.2d 206 (N.J. 1992) 5

INTRODUCTION

The primary argument in the Briefs in Opposition of Respondents Board of Pensions and Evangelical Lutheran Church in American (collectively "the denomination ELCA") is that the Court of Appeals's decision rests on an independent and adequate state ground -- the Freedom of Conscience Clause of the Minnesota Constitution. While the Minnesota Constitution may provide an independent ground for the Court of Appeals's decision, the central question raised by Petitioners' petition is whether that ground is adequate or whether it violates the United States Constitution. Contrary to the denomination ELCA's suggestion, this question is an appropriate one for this Court. See, e.g., Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931) (stating that it is incumbent upon the Court "to ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment"); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681-82 (1930) (holding that there was not an independent and adequate ground of decision because the state supreme court decision violated the due process clause of United States Constitution by depriving plaintiffs of any forum in which to have their case heard). The paucity of authority that the denomination ELCA musters to support the claim that the Court of Appeals's decision does not violate the Constitution merely highlights this as an issue that requires resolution by this Court.[1]

---

[1] Although the denomination ELCA also argues that the Court should not grant certiorari because this issue was not raised below, it concedes that this does not preclude this Court from considering this issue. See Brief in Opposition of Board of Pensions at 13-14 (recognizing exceptions to general rule that issue must be raised below); Brief in Opposition of Evangelical Lutheran Church in America at 14-15

The denomination ELCA attempts to obscure this issue by emphasizing a distorted version of the facts in which (1) the money in the pension plan ("Plan") managed by the denomination ELCA belongs to the denomination ELCA; (2) the denomination ELCA owes no direct fiduciary duties to the participants in the Plan including Petitioners; and (3) the Plan did not experience underperformance losses of more than $227 million between 1988 and 1991. None of these "facts" are true. The denomination ELCA also suggests that this lawsuit is about religious doctrine. This, too, is also false.

I. THE FUNDAMENTAL FACT UNDERLYING THIS ENTIRE LITIGATION IS THAT THE PENSION ASSETS BELONG TO THE INDIVIDUAL PARTICIPANTS IN THE PLAN, INCLUDING PETITIONERS, *NOT* TO THE DENOMINATION ELCA.

Each participant has an individual account in the Plan which is immediately 100% vested. Pet. App. P-2. These individual pension accounts are funded by the Petitioners' employer congregations, which contribute a percentage of their employees' income to their employees' individual accounts in the Plan. Id. at O-2 to O-3. Petitioners are *not* employees of the denomination ELCA. They are employees of individual congregations, and each congregation is a separate non-profit corporation. Thus, not one cent of the money in each participant's pension account was contributed to that account by the denomination ELCA. Because the Plan is a

---

(same). For the reasons set forth in the Petition for Writ of Certiorari at 9-10, the Court should not find the fact that this issue was not raised below to bar certiorari.

defined contribution plan, it is the participants in the Plan -- and not the denomination ELCA -- who directly bear the risk of investment loss.

II. THE DENOMINATION ELCA OWES DIRECT FIDUCIARY DUTIES TO ALL PARTICIPANTS IN THE PLAN, INCLUDING PETITIONERS.

Under both the common law and the ERISA fiduciary standards the denomination ELCA contracted to follow, the denomination ELCA owes the participants in the Plan duties of undivided loyalty and prudence in the management of the participants' pension accounts. Thus, the applicable fiduciary standards require the denomination ELCA to manage Petitioners' pension accounts *solely* in the interests of Petitioners and for the *exclusive purpose* of providing retirement benefits to Petitioners -- and not for *any* other purpose. Id. at L-4, M-2 to M-3, N-3 to N-4, O-6 to O-7.

III. FOR PURPOSES OF THE COURT OF APPEALS' DECISION AND THIS COURT'S REVIEW, IT *MUST* BE TAKEN AS TRUE THAT THE PLAN SUFFERED $227 MILLION IN LOSSES.

On motions for summary judgment, the court's function is not to decide issues of fact but to determine whether there are issues of fact to be tried. Simonson Cashway Co., Inc. v. Merickel Const. Co., Inc., 391 N.W.2d 903 (Minn. App. 1986). Here, Petitioners submitted an affidavit that shows that the non-social purpose funds of the Plan suffered underperformance losses of more than $227 million between 1988 and 1991. The affidavit was submitted to the trial court in full compliance with Minnesota Rule of Civil Procedure 56.05, and thus the data and the conclusions of the affidavit

had to be taken as true for purposes of the denomination ELCA's summary judgment motion and they must also be taken as true on certiorari. If the denomination ELCA disputes the fact that the Plan suffered underperformance losses of more than $227 million between 1988 and 1991, then, certainly, that is a highly relevant genuine issue of material fact requiring trial, especially since it is the participants, including Petitioners, who directly bear those losses in their personal pension accounts.

IV. THIS LAWSUIT IS NOT ABOUT RELIGIOUS DOCTRINE.

The denomination ELCA suggests that this lawsuit is about religious doctrine. This suggestion is utterly false. There is not one single allegation in Petitioners' Complaint about any religious doctrine, Lutheran or otherwise. All religious doctrine is irrelevant to the management of Petitioners' pension accounts. Pension fund investment practices are governed by common law and ERISA fiduciary standards. In the real world of investment, the general rule is that the fiduciary may not set aside the prudential standard of profit maximization consistent with safety to pursue the fiduciary's religious, political or social goals. Thus, unless the pension account owner gives the fiduciary informed consent to invest or divest the pension account according to nonfinancial goals, then it is not the prerogative of the fiduciary -- in this case the denomination ELCA -- to invest or divest the pension accounts according to the fiduciary's religious, political or social goals.

What the Petitioners object to, and what this lawsuit is really about, is the actual divestment of the Petitioners' pension accounts between 1988 and 1993 of securities of companies doing business in South Africa without

Petititioners' knowledge or informed consent. The denomination ELCA is free to adopt a policy of investment. It is not free, however, to apply that policy to the pension accounts owned by the Petitioners without the Petitioners' permission. Informed consent is a key factor to determining whether a fiduciary has acted properly under the law. In order to determine whether informed consent has been given or not, the civil court would *not* have to inquire into Lutheran doctrine. The only question the trier of fact would have to ask would be: was consent given or not?

Petitioners acknowledge that there may be certain circumstances under which they might not want the denomination ELCA to invest in certain companies. However, any such exceptions are the privilege of the owners of the assets to make. The fiduciary may not act without the express permission of the account owner. The underlying reality in this case is that the denomination ELCA used the Petitioners' property without either the Petitioners' knowledge or consent.[2]

---

[2] Respondents also claim that the Minnesota Court of Appeals's decision in this case does not conflict with decisions of other state or federal courts or with relevant decisions of this Court. Petitioners vigorously disagree. The state and federal courts have held repeatedly that when civil, contract, or property rights arise from a church controversy, the civil courts have jurisdiction to apply neutral principles of law. See, e.g., Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982); Church of God in Christ, Inc. v. Stone, 452 F. Supp. 612 (D. Kan. 1976); Clough v. Wilson, 368 A.2d 231 (Conn. 1976); Atkins v. Walker, 200 S.E.2d 641 (N.C. 1973); Welter v. Seton Hall University, 608 A.2d 206 (N.J. 1992); and Fellowship Tabernacle, Inc. v. Baker, 869 P.2d 578 (Idaho App. 1994). The Minnesota Court of Appeals's decision also conflicts with relevant decisions of this Court. See, e.g., General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1355, 1372-73 (1978) (applicants

If the decision of the Minnesota Court of Appeals is allowed to stand it will mean that under Minnesota law a party to a contract can impose his/her religious beliefs on other parties to the contract. Thus, this Court should grant certiorari in this matter to clarify an area of law that affects every person who enters into a contract with a religious organization, to ensure uniformity of civil court jurisdiction throughout the country when a party to a contract with a religious organization is aggrieved by the organization's conduct, and to protect the fundamental civil rights guaranteed under the United States Constitution to all those whose enter into contractual agreements with religious organizations.[3]

---

were "plainly wrong" in asserting that the First and Fourteenth Amendments prevent civil courts from deciding disputes in which breach of contract is alleged); Synanon Foundation, Inc. v. California, 444 U.S. 1307-1308 (1979) (religious foundation not entitled to different treatment under the First and Fourteenth Amendments than that accorded to other charitable trusts; neutral principles of state law should be used to resolve the dispute).

[3] Respondents suggest that the issues raised here are not likely to recur, but this Court is already considering another Petition For Writ of Certiorari to the Minnesota Court of Appeals raising issues similar to those raised here. See Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. App. 1996), review denied, March 19, 1996 and Olson v. Luther Memorial Church, 1996 WL 70102 (Minn. App. February 13, 1996), review denied, March 19, 1996, petition for cert. filed, (June 17, 1996) (No. 95-___).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 9, 1996

Respectfully submitted,

LYNN E. BASICH
Counsel of Record
3000 North Hamline Avenue
Roseville, MN 55113
(612) 633-3232

Robert C. Bell
PETERSON, BELL, CONVERSE, & JENSEN P.A
3000 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
(612) 342-2323

Craig W. Gagnon
Peter R Bisio
OPPENHEIMER WOLFF & DONNELLY
3400 Plaza VII Building
45 South Seventh Street
Minneapolis, MN 55402
(612) 344-9300